

Rule Aid: EPA Policy on Consultation and Coordination with Indian Tribes

The EPA Policy on Consultation and Coordination with Indian Tribes (EPA Consultation Policy), effective May 4, 2011, responds to the Presidential Memorandum on Tribal Consultation, issued November 5, 2009, directing agencies to develop a plan to fully implement Executive Order 13175.¹ The EPA Consultation Policy sets a broad standard for when EPA should consider consulting with federally-recognized tribal governments. This standard for consultation applies to a wide range of Agency activities and is based on the directive for tribal consultation established under Executive Order 13175 and the principles expressed in the 1984 EPA Policy for the Administration of Environmental Programs on Indian Reservations. Executive Order 13175 applies to a narrower set of activities (primarily rulemakings) than the EPA Consultation Policy, but when it does apply additional procedural requirements beyond those set out in the EPA Consultation Policy must be met.

This is the first of two Rule Aids on tribal consultation. Once a determination is made that an action warrants consultation under the broader EPA Consultation Policy, **Rule Aid: Executive Order 13175, Consultation and Coordination with Indian Tribal Governments** must be referenced to determine whether the additional procedural requirements apply under Executive Order 13175.

The Standard for Consultation under the EPA Consultation Policy:

The standard under the EPA Consultation Policy is to consult on a government-to-government basis with federally recognized tribes when EPA actions and decisions *may affect tribal interests*. For example, a tribe's interests may be affected if a proposed action impedes the tribe's ability to implement and execute its own environmental programs, or a tribe is charged with the day-to-day management of a program or regulation. Tribal interests may be affected in a variety of ways, directly or indirectly, on or off reservations and/or Alaskan Native Villages. Activities that are normally appropriate for consultation if they may affect one or more tribes include, but are not limited to:

- Regulations or rules
- Policies, guidance documents, directives
- Budget and priority planning development
- Legislative comments

¹ Exec. Order No. 13,175, 3 C.F.R. 304 (2000), *reprinted in* 25 U.S.C. § 450 (2000).

- Permits
- Civil enforcement and compliance monitoring actions
- Response actions and emergency preparedness
- State or tribal authorizations or delegations
- EPA activities in implementation of U.S. obligations under an international treaty or agreement

Examples of Specific Activities that EPA Has Consulted On:

- OW – “Revisions to the Unregulated Contaminant Monitoring Regulation for Public Water Systems” (UMCR 3) – affects tribes operating water treatment systems.
- OW – “Proposed Revision of the Total Coliform Rule” (RTCR) – minimal expected average annual tribal household water cost increase of \$4.50.
- OAR’s Office of Atmospheric Programs – “Proposed Transport Rule” – reduction of transport of air pollution to downwind areas could have potential future impacts on Tribes that build new power plant units (e.g., ability to trade and distribution of allowances).
- OAR, Climate Change Division – “Green House Gas Reporting Program (GHG RP), Petroleum and Natural Gas Systems Rule (Subpart W)” – would impact and require one Tribe to report.
- OEI – “Toxic Release Inventory (TRI) Industry Sectors Expansion Rule” – gives tribes the opportunity to receive TRI data on sources on or near their reservations.
- OSWER – “Revising Underground Storage Tank (UST) Regulations” - revisions to existing requirements and new requirements for secondary containment and operator training that will apply in Indian country in states that have not obtained state program approval.
- OCSPP – “National Certification and Training Plan” – establishes a federal certification program for applicators of restricted use pesticides on tribal lands.

When Consultation Should Occur:

Consultation should occur early enough in the action development process (ADP) to allow tribes the opportunity to provide meaningful input prior to EPA deciding whether, how, or when to act on the matter under consideration. As proposals and options are developed, consultation and coordination should be continued to ensure that the overall range of options and decisions is shared and deliberated by all concerned parties, including additions or amendments that occur later in the process.

EPA's Action Development Process Guidance (revised March 2011) states that consultation should occur "at appropriate points during the process."² Specifically,

- **Tier 1 and Tier 2 Actions:** Ideally, consultation occurs during the period after the approval of the detailed analytic blueprint (DABP) and before options selection.
- **Tier 3 Actions:** Consultation should precede major decisions in the action development process.

Please refer to the ADP Guidance for additional information about consultation in the rulemaking process.

Tribal officials may also request consultation. EPA attempts to honor requests from tribal governments, considering the nature of the activity, past consultation efforts, available resources, timing considerations, and all other relevant factors.

Responsibilities of Tribal Consultation Advisors:

Each headquarters and regional office has a designated Tribal Consultation Advisor (TCA) who acts as a point of contact for EPA staff, tribal governments, and other parties interested in the consultation process in their office/region. In addition, TCAs are responsible for:

- Assisting in identifying matters appropriate for consultation;
- Preparing summary information on consultation activities;
- Receiving and providing advice within their respective program offices and regions on what actions may be appropriate for consultation; and
- Serving as in-office subject matter experts to assist staff and management in the implementation of the Agency's consultation policy.

Additional information sources:

- EPA's Tribal Portal: <http://www.epa.gov/indian>
- EPA's Tribal Portal Consultation Page: <http://www.epa.gov/indian/consultation>
- EPA's Policy on Consultation and Coordination with Indian Tribes, May 4, 2011. <http://www.epa.gov/indian/pdf/cons-and-coord-with-indian-tribes-policy.pdf>
- Presidential Memorandum on Tribal Consultation, November 5, 2009. <http://www.epa.gov/indian/pdf/tribal-consultation-memorandum-09.pdf>
- TCAs:

² "EPA's Action Development Process: Guidance for EPA Staff on Developing Quality Actions". U.S. EPA, Office of Policy, OP Action Development Series. Revised: March 2011. [http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/\\$File/adp03-00-11.pdf](http://yosemite.epa.gov/sab/sabproduct.nsf/5088B3878A90053E8525788E005EC8D8/$File/adp03-00-11.pdf).

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